

FILED

NOV 27 2002

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE CITY OF TULSA, and THE TULSA METROPOLITAN UTILITY AUTHORITY,
Plaintiffs

Vs.

TYSON FOODS, INC., COBB-VANTRESS, INC., PETERSON FARMS, INC.,
SIMMONS FOODS, INC., CARGILL, INC., GEORGE'S, INC., and
CITY OF DECATUR, ARKANSAS,
Defendants

01-CV-900-EAC(C)

**POULTRY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION AND BRIEF
FOR PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS
ON ISSUE OF LIABILITY FOR GROWERS' DISPOSAL OF POULTRY MANURE
OR, IN THE ALTERNATIVE,
MOTION AND BRIEF TO STRIKE PLAINTIFFS' MOTION AND BRIEF FOR
PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS**

Gary V. Weeks
Vince Chadick (OB #15981)
James M. Graves (OB #16604)
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
(479) 521-9996

AND

Richard L. Carpenter, Jr. (OB #1504)
CARPENTER, MASON & McGOWAN
1516 S. Boston Avenue, Suite 205
Tulsa, OK 74119-4013
(918) 584-7400

Attorneys for George's, Inc. and also
signing by consent of other Defendants

November 27, 2002

EXHIBIT

99

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
GENERAL FACTUAL BACKGROUND	1
INTRODUCTION	2
STATEMENT OF UNDISPUTED FACTS	3
DISCUSSION	17
PROPOSITION I	
THE POULTRY DEFENDANTS ARE NOT LIABLE FOR THE ACTS OF INDEPENDENT CONTRACT GROWERS IN THE WATERSHED BASED ON THEIR NORMAL AND EXPECTED CONTRACT OPERATIONS.....	17
PROPOSITION II	
LAND APPLICATION OF LITTER DOES NOT CONSTITUTE A NUISANCE <i>PER SE</i>	23
PROPOSITION III	
PLAINTIFFS HAVE FAILED TO SHOW THAT THE POULTRY DEFENDANTS ARE LIABLE AS A MATTER OF LAW FOR VIOLATING STATUTES REGARDING THE POLLUTION OF A MUNICIPAL WATER SUPPLY.....	25
POULTRY DEFENDANTS' MOTION TO STRIKE	26
CONCLUSION	28
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

Cases

<u>Amoco Pipeline Co. v. Herman Drainage Sys., Inc.,</u> 212 F.Supp.2d 710 (W.D. Mich. 2002)	19
<u>Bleeda v. Hickman-Williams,</u> 205 N.W.2d 85 (Mich. Ct. App. 1973)	18
<u>Carr v. Alta Verde Indus. Inc.,</u> 931 F.2d 1055 (5 th Cir. 1991)	23
<u>Concerned Area Residents for the Env't v. Southview Farm,</u> 834 F.Supp. 1410 (W.D.N.Y. 1993)	23
<u>Higbee v. Starr,</u> 598 F.Supp. 323 (E.D. Ark. 1984)	23
<u>McQuilken v. A&R Dev. Corp.,</u> 576 F.Supp. 1023 (E.D. Penn. 1983)	18-19
<u>Peairs v. Fla. Publ'g Co.,</u> 132 So.2d 561 (Fla. Ct. App. 1961)	20
<u>Shannon v. Mo. Valley Limestone Co.,</u> 122 N.W.2d 278 (Iowa 1963)	20
<u>Tankersly v. Webster,</u> 243 P.2d 745 (Okla. 1925)	21
<u>U.S. v. Aceto Agr. Chem. Corp.,</u> 699 F.Supp. 1384 (S.D. Iowa)	20
<u>Weinman v. DePalma,</u> 232 U.S. 571 (1914)	17

Statutes

27A O.S. § 2-6-105	24
50 O.S. § 1.1	25

Rules

FED. R. CIV. P. 12	26, 28
--------------------------	--------

Other Authorities

RESTATMENT (SECOND) OF TORTS § 427(B)	19
Wright & Miller, <i>Federal Practice and Procedure</i>	27

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

1. THE CITY OF TULSA,
2. THE TULSA METROPOLITAN
UTILITY AUTHORITY,
Plaintiffs

v.

Case No. 01-CV0900EA(C)

1. TYSON FOODS, INC.,
2. COBB-VANTRESS, INC.,
3. PETERSON FARMS, INC.,
4. SIMMONS FOODS, INC.,
5. CARGILL, INC.,
6. GEORGE'S, INC.,
7. CITY OF DECATUR, ARKANSAS,
Defendants

**POULTRY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION AND BRIEF
FOR PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS
ON ISSUE OF LIABILITY FOR GROWERS' DISPOSAL OF POULTRY MANURE
OR, IN THE ALTERNATIVE,
MOTION AND BRIEF TO STRIKE PLAINTIFFS' MOTION AND BRIEF FOR
PARTIAL SUMMARY JUDGMENT AGAINST POULTRY DEFENDANTS**

Come now the Poultry Defendants, and for their Response to Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure (hereinafter "Plaintiffs' Motion and Brief") and, in the alternative, for their Motion and Brief to Strike Plaintiffs' Motion and Brief, state as follows, to-wit:

GENERAL FACTUAL BACKGROUND

The background and general information regarding the plaintiffs' claims against the Poultry Defendants have been briefed at length by plaintiffs and the Poultry Defendants in their various motions and briefs filed to date. As such, for the purposes of this Response, instead of taking up more of this Court's valuable time reciting

background information already briefed, the Poultry Defendants hereby incorporate by reference the factual background information contained in their Joint Motions filed previously and the background information contained in their Joint Motion for Summary Judgment and Brief in Support.

INTRODUCTION

With regard to their Motion to Strike, plaintiffs' state that when this cause of action was filed on December 10, 2001, plaintiffs' entire theory of the case regarding liability of the Poultry Defendants for the acts of their independent contract growers in the Watershed was that the Poultry Defendants exercised control over their contract growers to such an extent as to negate the contract growers' independent contractor status. (Complaint, ¶¶ 17-22) Plaintiffs continued to assert this single theory of liability for six (6) months, including in their Amended Complaint. (See generally: Amended Complaint) Plaintiffs did not change their theory of liability on this issue nor did they plead the new theories they are now advancing in the instant Motion (e.g. employer is liable for acts of independent contractor that are inherently dangerous, or that the Integrators should be liable since they knew that a trespass or nuisance was likely to result from the Contract Growers' activities). (Amended Complaint, ¶¶ 17-22)

As plaintiffs succinctly state, "[m]uch time and effort has been devoted in discovery to the issue of whether these growers are truly independent contractors, given the degree of control exercised over their operations." (Plaintiffs' Motion and Brief for Partial Summary Judgment, p. 2)(emphasis added) However, now, for the very first time, plaintiffs assert a new and completely different theory of liability. For all of these

reasons, the Poultry Defendants request that the Court Strike the plaintiffs' Motion and Brief, or in the alternative deny the motion.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs submit Thirty-One (31) numbered paragraphs of "facts" which they allege are undisputed. Poultry Defendants dispute the following facts or necessarily complete the facts contained in the plaintiffs' Statement of Undisputed Facts.

1. Poultry Defendants acknowledge that they contract with growers who are independent contractors who raise poultry for the Poultry Defendants. The Poultry Defendants further acknowledge that they deliver baby birds to their contract growers, provide feed and medication for the birds, provide suggestions to improve each contract grower's performance, and pick the birds up prior to processing. Peterson disputes plaintiffs' statement that David Holcombe is a "representative" of Peterson. More correctly stated Mr. Holcombe is an employee of Peterson. (Deposition testimony of Peterson employee and grower, David Holcombe, Exhibit No. 1, p. 3)

2. Poultry Defendants acknowledge that the Poultry Defendants control the genetics and breeding stock of birds placed with their contract growers to attempt to achieve the highest performance for the contract growers and, in turn, improve the end product that each contract grower provides.

3. Poultry Defendants dispute this paragraph because it is argumentative and incorrectly equates manure and litter to be one and the same substance. Plaintiffs mischaracterize the testimony of David Holcombe, Peterson employee and grower, which is that it has generally been the practice in the industry for growers to either sell their chicken litter, give it away or apply it to their own land. Mr. Holcombe did not testify

concerning Peterson's knowledge of this practice or that such practice had been going on since the 1950's. (See: Plaintiffs' Motion and Brief in Support, Exhibit 3; Deposition testimony of Peterson employee and grower David Holcombe, pp. 58-59) Plaintiffs also mischaracterize Ron Mullikin's testimony. Mr. Mullikin, a former Peterson employee, not a "Peterson representative" as plaintiffs' denominate Mr. Mullikin, testified that he could only speculate that growers in the Northeast Oklahoma and Northwest Arkansas area had been land applying chicken litter for as long as they had been growing chickens, and that this could have been done for decades. (See: Plaintiffs' Motion and Brief in Support, Exhibit 5; Deposition testimony of Ron Mullikin, pp. 167-169)

4. Plaintiffs' mischaracterize Schaffer's testimony. The poultry industry has been aware of the environmental impact of nitrogen contained in chicken litter since the late 1980s but did not become aware of the environmental impact of phosphorus or phosphates contained in chicken litter until approximately the mid-1990s. (See: Plaintiffs' Motion and Brief in Support, Exhibit 4; Deposition of Tyson Representative, Archie Schaffer, p. 43, lines 20-25) The Poultry Defendants also dispute this paragraph because it mischaracterizes Mr. Simmons' testimony. The question that was posed to Mr. Simmons was a very broad question and did not contain "environmental impact" as a topic, nor did it contain phosphorus as a topic. The portion of Mr. Simmons' deposition which is attached to Plaintiffs' Motion and Brief in Support as Exhibit 7 reflects the true and correct question and answer exchange.

The Poultry Defendants also dispute this paragraph because the Plaintiffs' statement that the "poultry industry has been aware since at least the late 1980's" of potential environmental risks from the land application of chicken manure is misleading.

Until very recently, the primary concerns of agronomists and the NRCS has been nitrogen, not phosphorus. Agronomists, soil scientists, NRCS in multiple states, and various state agencies are in the process of developing appropriate guidelines for the land application of poultry litter with a present focus on phosphorus. In the past, the focus was primarily on nitrogen. In fact, Plaintiffs' designated expert in the area of soil science, Dr. Jarrell, admits that Nutrient Management Plans in his state are still nitrogen-based. (Deposition of Dr. Jarrell, Exhibit No. 2, pp. 22 – 24, ll. 20-10). Dr. Jarrell further explained that we now have better tools for understanding phosphorus that were not available in the past. (Deposition of Dr. Jarrell, Exhibit No. 2, p. 17, ll. 6-17). Many states are in the process of developing methods to determine appropriate guidelines for the land application of poultry manure. Dr. Jarrell plans to spend another two years to validate the Wisconsin phosphorus index. (Deposition of Dr. Jarrell, Exhibit No. 2, p. 24, ll. 7-10). While there is a recognition that a potential risk may be present, there is no consensus as to when land application of poultry litter actually poses a risk. The Poultry Defendants' expert agronomist, Dr. Tucker, testified that in his fifty years of experience, he has never found a field saturated with phosphorus. There is no data or evidence that fields or pastures with high Soil Test Phosphorus¹ readings cause any harm or loading to waters. (Deposition of Dr. Tucker, Exhibit No. 3, p. 31, and p.36).

Furthermore, Plaintiffs' statement that "the poultry industry is aware" is not supported by the record for purposes of the motion. In support of this contention, Plaintiffs' cite the deposition testimony of a Simmons' representative and a Tysons' representative. Plaintiffs decided to sue six companies that have operations in Northwest

¹ As explained in response to Plaintiffs' Motion for Partial Summary judgment on Issue of Liability Under CERCLA, response to Plaintiffs' statement of fact No. 18, the topic of "Soil Test Phosphorus" will

Arkansas. However, the poultry industry is certainly much larger than the six Defendants Plaintiffs sued and the two representatives Plaintiffs' cite for purposes of this motion.

5. Plaintiffs' mischaracterize Mr. Schaffer's testimony. His testimony was that the document adopted by Tyson and referred to in this paragraph was used to educate Tyson's contract growers on Best Management Practices in general. (See: Plaintiffs' Motion and Brief in Support, Exhibit 4; Deposition of Tyson Representative, Archie Schaffer, p. 46, lines 12-14) Mr. Schaffer did not state that the document was adopted or otherwise used to educate the growers about potential environmental risks from land application of poultry manure and litter.

6. The Poultry Defendants dispute Plaintiffs' characterization or summary of the seminar materials. The seminar materials (See: Plaintiffs' Motion and Brief, Exhibit 9) are of no less than thirty-five (35) pages and contain numerous findings. Plaintiffs' attempt to distill those reports down to four (4) conclusions which Plaintiffs' believe are beneficial to their arguments herein is improper and inaccurate. The 1994 paper from a research conference is interesting, but does not support any statement of fact material to this Court's ruling. Plaintiffs provide no explanation as to the origin of this document, the nature of the "research conference" from which this document appears to be generated, who was invited to attend the conference and who actually attended. Plaintiffs fail to demonstrate that any representatives of the Poultry Defendants had any knowledge of the "research conference" or this paper. Furthermore, the referenced seminar materials constitute inadmissible hearsay, and accordingly any references to these materials should be stricken as an improper basis for summary judgment.

be the subject of extensive expert testimony at trial.

In addition, the paper shows that at the time it was published, phosphorus research was still developing. One of the presenters at this "research conference" advised that "soils and management practices that are vulnerable to P (phosphorus) loss, must be identified to implement effective and economically viable management systems that minimize P transport." (See: Plaintiffs' Motion and Brief in Support, Exhibit 9, p. 3) This demonstrates that at the time the paper was published, these management practices were being identified and researched by these scientists. The paper certainly does not go so far as to make specific recommendations relating to the soils in this Watershed. Furthermore, the paper does not demonstrate any type of consensus among the experts as to what might be considered excessive phosphorus levels. This study of phosphorus reactions in the soil and water is still developing and will be the subject of extensive expert testimony at trial.

7. Poultry Defendants dispute the plaintiffs' summary of the Poultry Water Quality Consortium's findings because the plaintiffs ignore significant and relevant aspects of the report. (See: Plaintiffs' Motion and Brief, Exhibit 10) For example, the report recognized that:

Properly managed poultry wastes from manure, litter, dead birds, and wastewater are profitable farm investments. An effective waste management plan provides for the proper collection, storage, handling, and use of poultry waste. Products produced from wastes reduce chemical fertilizer costs, improve soil quality, and protect water resources, air quality, and human and animal health.

Nonetheless, the referenced third-party materials constitute inadmissible hearsay, and accordingly any references to these materials should be stricken as an improper basis for summary judgment.

8. Plaintiffs mischaracterize the report entitled, "Confined Animal Inventory: Lake Eucha Watershed." (See: Plaintiffs' Motion and Brief, Exhibit 11) The report contains numerous findings, but Plaintiffs' statement of fact attempts to distill the report down to one (1) conclusion. Moreover, plaintiffs use this report as the basis for "undisputed" statements of fact and further rely upon it in their argument, yet the report amounts to hearsay and the calculations contained within it are flawed. The report is flawed because, for example, it states "[o]ur calculations assume that growers are running their houses at maximum capacity, but this is often not the case. Many growers will only raise three or four flocks a year rather than five which is the maximum possible." (See: Plaintiffs' Motion and Brief, Exhibit 11, p. 3) The report should further be excluded from business because it cannot be admitted into evidence in lieu of plaintiffs' experts' own opinions and testimony. This Court should exclude this report in its entirety when viewing this Motion because the plaintiffs are attempting to use it against the Poultry Defendants as if it were an additional expert witness report. However, it is not a report of a designated expert and the Poultry Defendants have not been able to depose the report's author prior to trial and they will not be able to cross-examine the author at trial. As an unsponsored, unsubstantiated, and unreliable expert witness report, it should be excluded in its entirety.

9. For the same reasons set forth in paragraph 8, *supra*, the Poultry Defendants dispute this report and plaintiffs' reliance on it as a basis for "undisputed" facts and argument. (See: Plaintiffs' Motion and Brief, Exhibit 12)

10. Poultry Defendants dispute this paragraph because it omits probative and relevant information contained in the referenced Exhibit. (See: Plaintiffs' Motion and Brief, Exhibit 13) For example, the plaintiffs omit that Mr. Wagner identified wastewater

treatment plants, cattle operations, human waste and background sources as other potential sources of phosphorus. Poultry Defendants further dispute this paragraph with respect to the contributions Mr. Wagner attributes to the Poultry Defendants because those approximations were compiled and supplied by Mr. Wagner who the Poultry Defendants have no control over and whose calculations the Poultry Defendants cannot verify and therefore cannot admit to the them.

11. Poultry Defendants dispute Plaintiffs' characterization or summary of the referenced letter. (See: Plaintiffs' Motion and Brief, Exhibit 14) The letter consists of numerous paragraphs that make multiple points. Plaintiffs' biased summation of the letter in two sentences is improper and inaccurate.

12. Poultry Defendants dispute Plaintiffs' characterization or summary of the letter. (See: Plaintiffs' Motion and Brief, Exhibit 15) The letter contains numerous estimations, calculations and approximations and plaintiffs' attempt to summarize it in only two sentences is improper and inaccurate. Furthermore, the referenced third-party communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

13. Poultry Defendants dispute this paragraph because it is incomplete and an inaccurate representation of the information contained in the memorandum. (See: Plaintiffs' Motion and Brief, Exhibit 16) The quotation provided by plaintiffs is incomplete and is disputed because the plaintiffs omitted five full paragraphs of the memorandum. Plaintiffs' reduction of the memorandum to a meager portion they deem useful is an inaccurate statement of fact. Furthermore, the referenced third-party

communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

14. Poultry Defendants dispute this paragraph because the quotation provided is incomplete and is disputed in the absence of the following information needed to make it complete. (See: Plaintiffs' Motion and Brief, Exhibit No. 17) At the "****" plaintiffs omitted the following:

The Oklahoma Broiler Council has proposed an eight point plan for a cooperative approach to poultry litter management. The Oklahoma Department of Agriculture has accepted this proposal with some modifications. The ODA is presently writing regulations to put the plan into action. ****

Following the last sentence of the quotation provided by plaintiffs', the plaintiffs' omitted the following:

If you have applied and are waiting for your plan to be formalized, please continue to use the "Dry Poultry Litter Handling Best Management Guidelines."

15. Poultry Defendants dispute the quoted portion of the letter referred to in plaintiffs' Statement No. 15 because it states in the final paragraph "Please write a letter to Governor Keating as soon as possible and tell him that you are concerned about water quality and the environment . . ." not "water quality in the environment" as stated by plaintiffs. (Plaintiffs' Exhibit 18).

16. Poultry Defendants dispute plaintiffs' biased abstract of the Task Force's Final Report. (See: Plaintiffs' Motion and Brief, Exhibit No. 19) That is a report containing numerous findings, but plaintiffs' attempt to summarize only a portion of it. Furthermore, the referenced third-party communication constituted inadmissible hearsay,

and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

17. Poultry Defendants acknowledge that a meeting occurred on or about December 5, 1997 and that at that meeting plaintiffs' and some of the Poultry Defendants discussed Tulsa's water supply. (See: Plaintiffs' Motion and Brief, Exhibit No. 20) Poultry Defendants dispute this paragraph to the extent that it makes inaccurate representations of the minutes of the recorded minutes of that meeting. Furthermore, the referenced third-party communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

18. Poultry Defendants dispute plaintiffs' characterization and summary of this letter. (See: Plaintiffs' Motion and Brief, Exhibit 21) The letter is a lengthy response to concerns voiced by plaintiffs during their meeting with some of the Poultry Defendants on December 5, 1997. The letter contains a detailed twelve (12) step process responding to plaintiffs' concerns. Plaintiffs' quotation of only one introductory paragraph is improper and inaccurate. Furthermore, the referenced third-party communication constituted inadmissible hearsay, and accordingly any references to this communication should be stricken as an improper basis for summary judgment.

19. Poultry Defendants dispute this paragraph because the information provided in this paragraph is incomplete and is disputed in the absence of noting that after the growers were informed of potential problems with land application of litter, they were encouraged to apply for a Farm Management Plan and encouraged to have soil samples taken before spreading any poultry litter.

20. Tyson Foods admits this paragraph.

21. Poultry Defendants dispute this paragraph because the quotation provided is incomplete and disputed in the absence of the following. (See: Plaintiffs' Motion and Brief, Exhibit 24) At the *** plaintiffs omitted the following brief but important sentence: "Your serviceman can help you with this." The following paragraph was also omitted:

If you haven't already done so, we strongly urge you to contact your Natural Resources Conservation Service (the old Soil Conservation Office) and request that they help you develop a Nutrient Management Plan. Doing this can help the industry avoid government regulations that could make litter handling even more difficult.

Plaintiffs' biased summarizations of documents and meetings, their quotation out of context of letters, reports, and memoranda, and their deliberate censorship of references that negate their argumentative versions of facts are improper and inaccurate.

22. Poultry Defendants dispute this paragraph because plaintiffs' Statement No. 22 is incomplete and misleading. Ron Mullikin, a former Peterson employee, explained at his deposition when questioned about the first sentence quoted by plaintiffs in Statement No. 22, "I think the statement there was one where I didn't feel equipped, didn't feel like I knew enough about everything that was going on to have an opinion about it." (Deposition of Ron Mullikin, Exhibit No. 4, p. 75) Mr. Mullikin testified that he left Peterson in August, 2000, and that he currently is employed by Wal-Mart. Mr. Mullikin stated that he had gone to work for Peterson as director of training in November, 1997, and came to have human resources and environmental responsibilities six to nine months later and did not have a background in the poultry industry. (Deposition of Ron Mullikin, Exhibit No. 4, pp. 15, 17-18, 20) In his deposition, Mr. Mullikin stated that the

first meeting that he attended concerning the growing issue of poultry litter and concerns are over problems that it could be creating was in February or March of 1998 with attendees from the States of Oklahoma and Arkansas, the USDA and the University of Oklahoma and OSU. Mr. Mullikin further testified that the ideas and perceptions presented at the meeting no one could really substantiate and what he recalls from the first meeting is almost confusion trying to understand what the problem was, what all the determining factors were and what all the inputs were. (Deposition of Ron Mullikin deposition, Exhibit No. 4, pp. 21-22, 29) A section of the Opinions on the Poultry Litter Issues Memo not quoted in Statement No. 22, states "We are also faced with a lack of science to help us understand where we are, and where we need to go. Agronomists can't agree on the movement of phosphate, the water solubility of the P in the litter, and means of making P more efficient in our feeds. How much P in our soils is too much? Agencies can't agree on max. soil levels. And if they could agree, how would they measure it? In our few check samples, we demonstrated how hard it is to get a good accurate sample." (See: Plaintiffs' Motion and Brief, Exhibit 25).

23. Poultry Defendants dispute this paragraph because plaintiffs' Statement No. 23 again incorrectly refers to Peterson's former employee Ron Mullikin as a "Peterson representative." Statement No. 23 is again incomplete and misleading. The memorandum referred to in Statement No. 23, whose subject is "Spavinaw Watershed Waste Management Plan Meeting," describes a meeting held to help growers in developing their own waste management plan which was sponsored by the NRCS and the Extension Service. (See: Plaintiffs' Motion and Brief, Exhibit 26) Mr. Mullikin in his deposition explained the phosphorus limit of 300 pounds referred to in the memorandum.

"The 300 pounds was an arbitrary number. It was a number that, once again, [was] not based on science. It was a number that someone -- I don't recall if it was the NRCS. I don't recall if it was the extension service, whether it was -- I think in the State of Oklahoma it was mandated by legislation." (Deposition of Ron Mullikin, Exhibit No. 4, , p. 113)

24. Poultry Defendants dispute this paragraph because plaintiffs' Statement No. 24 incorrectly refers to former employee Ron Mullikin as "Peterson's environmental representative." In response to the deposition question posed by plaintiffs' counsel, "Did you come to some belief by the time you left the company as to what portion or percentage of the problem might be caused by the poultry industry?" Mr. Mullikin answered "I believe that there could be phosphate in the lake that came from the soils that had poultry litter applied to them; but to be able to exact those numbers, I wouldn't -- I don't think anybody can." (Emphasis added). (See: Plaintiffs' Motion and Brief, Exhibit 5; Mullikin deposition, pp. 40-41) During plaintiffs' counsel's deposition questioning of Mr. Mullikin concerning a December, 1997 U.S. Senate report concerning the potential for animal waste pollution, the following colloquy occurred:

Q. Would you look at page 4? I think it's the next page maybe, at the bottom talking about environmental impact. They first talk about spills directly into the water have an impact. It goes on to say 'In addition, the excessive growth and decay of algae and other aquatic organisms that feed on excessive nutrients in water deplete dissolved oxygen. The resulting hypoxia (low oxygen) from chronic nutrient enrichment can result in fish kills, odor and overall degradation of water quality'. (Emphasis added). Do you agree with that statement, Mr. Mullikin?

A. Based on what I know, yes.

Q. Did you know that in February of 1998 when you started this job?

A. Yes.

(Deposition of Ron Mullikin, Exhibit No. 4, pp. 68-69) Finally, plaintiffs mischaracterize in misleading fashion, Mr. Mullikin's memo dated November 24, 1998 and deposition testimony concerning this memo. Mr. Mullikin's frustration is not due to lack of action to address the issues as argued by plaintiffs in Statement No. 24, but rather with his inability to find any new solutions to the issues. As he states in his final paragraph of this memo: "I realize once again I've come with no new solutions, but we continue to look at anything that may solve all or part of our problem." (See: Plaintiffs' Motion and Brief, Exhibit 5; Mullikin deposition pp. 142-144 & Exhibit 27, memo dated November 24, 1998)

25. Poultry Defendants dispute this paragraph because plaintiffs misstate and mischaracterize the deposition testimony of David Holcombe in plaintiffs' Statement No. 25. Mr. Holcombe testified that at the 1999 Peterson meeting with growers, there were general comments about the water, the issues that were facing the industry and telling the growers that there were issues out there to be concerned with and to make sure that the growers applied their litter according to their waste management plans. Mr. Holcombe testified that the main part of the discussion was how the growers were going to work with their litter, what the growers did with their litter and how to apply the litter. The growers were told that water quality was an issue that they needed to be concerned about. (See: Plaintiffs' Motion and Brief, Exhibit 3; Holcombe Deposition, pp. 60-62)

26. Poultry Defendants do not dispute that Cargill met with its contract growers on a regular basis to provide education, guidance, and best management practices on waste management and disposal matters.

27. Poultry Defendants dispute this paragraph because it is incomplete. It is incomplete because the plaintiffs omitted the following before the quoted portion provided by the plaintiffs begins:

It was because we were so involved with the City of Tulsa looking at the lake and quality, and so our first deal was that we can take our litter out.

The plaintiffs also omitted the following, which should be included in the plaintiffs' "quote" following the first ***:

We did it [because] it was something that we could do. We were trying to identify what we could do to help solve the problem. And so we said we don't have all the answers, but we can take our litter out, and we were trying to educate our growers through meetings. Extension people helped put those meetings on too.

28. Tyson Foods admits this paragraph.

29. Tyson Foods admits this paragraph.

30. Poultry Defendants dispute this paragraph because the quotation provided in this paragraph is incomplete and disputed in the absence of the following. At the *** plaintiffs omitted the following portion of the quotation: "[w]e are a little chagrined that we have received no acknowledgement of that effort (much less credit) from the Tulsa World and others, who refuse to accept the fact that there are lots of other contributors of phosphorous to the watershed, in addition to poultry."

31. With respect to Paragraph Thirty-One of the plaintiffs' Statement of Undisputed Facts, the Poultry Defendants dispute this paragraph because the quotation is incomplete and disputed in the absence of the following. At the *** plaintiffs omitted the following portion of the quotation: "[t]he practice of rotating crops and application sites will help remove excess phosphorus. Maintaining soil pH between 6.0 and 7.0, maximizes plant phosphorus uptake, thereby reducing accumulations."

DISCUSSION

PROPOSITION I

THE POULTRY DEFENDANTS ARE NOT LIABLE FOR THE ACTS OF INDEPENDENT CONTRACT GROWERS IN THE WATERSHED BASED ON THEIR NORMAL AND EXPECTED CONTRACT OPERATIONS.

- A. Plaintiffs' Legal Authorities Do Not Establish a Basis for the Court to Override the Independent Contractor Status of Contract Growers.

Plaintiffs hope to convince the Court to enforce a limited exception to the general rule that an employer is not liable for the acts of an independent contractor. The caselaw and authorities offered by plaintiffs have little or no persuasive value because they are either wholly irrelevant or factually distinguishable.

In Weinman v. DePalma, 232 U.S. 571 (1914), the United States Supreme Court did identify an exception to the general rule of no liability for the acts of an independent contractor where the "work performed itself" is a nuisance or injures or destroys the property of another. Id. at 576 This statement helped create what is now referred to as the inherently dangerous activity exception to the general rule of no liability.

In attempting to apply the exception of Weinman to the factual circumstances of contract growers, plaintiffs stretch the holding of Weinman beyond the breaking point. The Weinman exception is not, as the plaintiffs would have the Court believe, that the employer is liable if a nuisance is likely to result; instead, the exception states that where the work actually performed is a nuisance or injures or destroys the property of another, the principal can be liable. Here, that is not the case because the work actually performed under the contract (i.e. growing chickens) does not inherently result in any nuisance.

Plaintiffs offer the case of Bleeda v. Hickman-Williams, 205 N.W.2d 85 (Mich. Ct. App. 1973), and a series of similar cases, all of which are factually distinguishable because in none of them is there a bargained for exchange between the employer and the independent contractor whereby the independent contractor gains control of the item or substance that a plaintiff alleges causes the nuisance. Additionally, in none of the cited cases does the alleged nuisance-causing substance have economic value to the independent contractor. In Bleeda, the employer was found liable for acts that occurred while the independent contractor delivered its employer's product to its employer's customers. Bleeda, 205 N.W.2d at 87

Here, that is simply not the case as the alleged nuisance occurs when the contract grower exercises its exclusive ownership and control over litter. It is not until after the contract growers have completed their work (i.e. growing chickens) that the alleged nuisance could potentially arise.

In Bleeda, the employer knew that the process itself caused a nuisance (it created dust and odor), but continued to use the services of the independent contractor to size and screen its coke and ultimately deliver it to the employer's customers (a fact not present herein). Here, the Poultry Defendants contract with their contract growers to raise chickens, and the contract growers are the contractual owners of litter. It is not until the grower asserts control over the litter that the alleged nuisance can arise. It is not the work contracted to be performed that creates the alleged nuisance; it is a separate and distinct act that creates the alleged nuisance.

In McQuilken v. A&R Dev. Corp., 576 F.Supp. 1023 (E.D. Penn. 1983), the court found that the employer of an independent contractor can be liable when the contractor is

employed to do work that the employer knows or has reason to “recognize that, in the ordinary course of doing the work ... the trespass or nuisance is likely to result.” McQuilken, 576 F.Supp. at 1033; quoting RESTATEMENT (SECOND) OF TORTS § 427B (Plaintiffs’ Motion and Brief, p. 21) Here, in the ordinary course of contracting with independent growers to raise chickens, there is no way for the Poultry Defendants to know or have reason to know that a nuisance or trespass will occur. As acknowledged, poultry litter has long been recognized as a valuable soil supplement for agronomic uses, which the contract growers are free to use as permitted by their nutrient management plans, or to sell for the use by others. Again, the Poultry Defendants have a right to assume that under the contract that the grower will make use of the litter in a manner consistent with applicable law.

Plaintiffs rely on Amoco Pipeline Co. v. Herman Drainage Sys., Inc., 212 F.Supp.2d 710 (W.D. Mich. 2002)(Plaintiffs’ Motion and Brief, p. 17), as a basis for ignoring independent contractor status. Because the Amoco case involves the “abnormally dangerous activities” exception, it has little relevance to the matter at hand, as it has not been pled by plaintiffs that either the raising of poultry or the application of litter is inherently dangerous. In Amoco, an employer / farmer employed an independent contractor to excavate a site on his farm. The farmer had actual knowledge of a petrochemical pipeline that cut through the farm his property near the location of the excavation but failed to inform the independent contractor of the existence of the pipeline. The Poultry Defendants cannot be aware of this type of special risk or abnormally dangerous activity because one simply is not present and as such this case has

little if any precedential persuasive value to the matter at hand, and thus the case does not support the plaintiffs' contention.

Another case of plaintiffs' involving the "inherently dangerous activities" exception is U.S. v. Aceto Agr. Chem. Corp., 699 F.Supp. 1384 (S.D. Iowa). (Plaintiffs' Motion and Brief in Support, p. 18) The Aceto case addresses the manufacture and disposal of pesticides and pesticide by-products and whether an employer arranged for the disposal of hazardous waste by-products under the guise of the contract. Aceto, 699 F.Supp. at 1387, 1389 The Aceto case concerned the disposal of a substance listed as hazardous under CERCLA. Conveniently, via their Motion in Limine, the plaintiffs are attempting to prevent the Poultry Defendants from showing a jury that litter is not classified as hazardous under any regulatory scheme. At any rate, because litter is not hazardous under CERCLA and is in no way abnormally dangerous, the cited case is absolutely irrelevant to the case at bar.

The court in Shannon v. Mo. Valley Limestone Co., 122 N.W.2d 278 (Iowa 1963), recognized that an employer of independent contractors has a duty to suppress a nuisance created by its independent contractors where the work being performed is the cause of the nuisance. Id. at 280 (Plaintiffs' Motion and Brief, p. 18) This proposition is also found in the case of Peairs v. Fla. Publ'g Co., 132 So.2d 561 (Fla. Ct. App. 1961) where the court stated where an employer gains knowledge of a "dangerous situation," it may be liable if it fails to halt or correct the situation. Peairs, 132 So.2d at 565 (Plaintiffs' Motion and Brief, p. 20) Herein, even if the work performed (growing chickens) did cause the alleged nuisance, which it does not, the work did not create the alleged nuisance in all situations. In fact, many of the farmers in the Watershed transport their

litter out of the Watershed and thus cannot contribute even theoretically to the alleged nuisance. Furthermore, there is a marketplace for poultry litter, whereby third parties buy the litter for their own uses, both within and without the Watershed, all of which is clearly outside the control of the Poultry Defendants. The alleged nuisance complained of by the plaintiffs does not amount to a “dangerous situation” or abnormally dangerous activity – in fact, plaintiffs’ own experts will testify that the phosphorus from any one area receiving litter in and of itself is most likely not damaging to the environment, but is only damaging if it reaches certain concentrated levels in a given geographical area in the aggregate from all sources. Thus, poultry litter is not inherently or abnormally dangerous or a nuisance in and of itself.

Moreover, even if an alleged nuisance or dangerous situation did arise in every situation, which it does not, when the Poultry Defendants became aware of concerns regarding phosphorus in the Watershed, they implemented Best Management Practices and other measures to abate prospective or alleged nuisances, despite the fact that the alleged nuisance (i.e. all phosphorus from all sources aggregated in the watershed) was not created by the Poultry Defendants’ conduct. If anything, the Poultry Defendants acted voluntarily to help educate the contract growers on litter management, and they cannot be held liable under the cases presented by plaintiffs because, in all of those cases, plaintiffs rely upon an employer’s failure to act to abate or control the nuisance created by the acts of its contractors.

After touching upon the law of numerous and non-controlling jurisdictions, plaintiffs finally address Oklahoma law in one paragraph on pages 21-22 of their Motion and Brief. In 1925, the Oklahoma Supreme Court found that an employer is subject to